DATO' SERI DR LING LIONG SIK

v.

KRISHNA KUMAR SIVASUBRAMANIAM

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN ZAKARIA J
[CIVIL SUIT NO: S3(S2)-23-37-2000]
9 FEBRUARY 2002

CIVIL PROCEDURE: *Particulars - Further and better particulars - Application under O. 18 r. 12(3) Rules of the High Court 1980 - Pleadings before court: re amended defence; amended statement of claim; plaintiff's reply - Distinction between facts and evidence - Whether opponent's evidence may be obtained - Skrine & Co v. MBf Capital & Anor - Whether particulars within ambit of legal and professional privilege - Section 126 Evidence Act 1950 - Relevancy of particulars sought for to facts in issue – Whether litigants entitled to particulars applied for*

CIVIL PROCEDURE: *Particulars - Material particulars in statement of claim - Application for further and better particulars under O. 18 r. 12(3) Rules of the High Court 1980 - Whether particulars sought for relevant - Particulars arising out of litigant's own averment - Whether particulars requested were matters of evidence - Pleadings relating to litigant's agents or servants - Whether litigants entitled to particulars applied for*

This claim arose out of a letter written by the defendant, a practicing advocate and solicitor representing one Dato' Soh Chee Wen ('the client'), addressed to the plaintiff, the Minister of Transport of the Government of Malaysia. The contents of the letter were published in various newspapers in the country on 14 June 2000. Arising from the respective pleadings, the parties applied for further and better particulars pursuant to O. 18 r. 12(3) of the Rules of the High Court 1980 ('RHC').

Held:

[1] The plaintiff's application for further and better particulars of the amended defence under para 4 of encl. 20 was rejected. This was by reason that the said particulars were matters of evidence for the defendant to adduce and to show whether he had taken reasonable steps to verify the instruction given by his client. Following the dicta in *Skrine & Co v. MBf Capital & Anor*, a litigant is not entitled to have his opponent's evidence. (pp 647 f-h & 648 a)

[2] The particulars prayed for by the plaintiff under para. 6(a) and (b) of the re amended defence were relevant to the issue of verification of the truth of the letter of demand with the client. The particulars did not come within the ambit of legal and professional privilege which is provided for in s. 126 of the Evidence Act 1950, as contended by the defendant. The defendant was therefore ordered to furnish the plaintiff the particulars sought for under those respective paragraphs. (pp 648 h & 649 e-f)

[3] Under para. 6(h) of the re amended defence, the plaintiff asked for the address and telephone number of the facsimile to which the letter was transmitted on 13 June 2000 and the date and mode of the client's instruction to do so. The defendant claimed privilege from furnishing such particulars. However, legal professional privilege only extends to communication for the purpose of seeking legal advice. It is limited to the information for, and content of any legal advice and it does not extend to matters observed by solicitor in the course of his retainer. This is in line with the provisions of s. 126 of the Evidence Act 1950. Accordingly, the particulars were ordered to be given in respect of matters as prayed in prayer 1(4)(a), (b), (c) of encl. 20. (pp 649 g & 650 b, d)

[4] The plaintiff's application in prayers 1(5)(a) (b) & (c) of encl. 20 was dismissed. The particulars sought for were irrelevant to the facts in issue. The question of how or from whom the defendant obtained information that one Lee Chai Huat had published the said letter to the various newspapers was a matter of evidence for the defendant to adduce at the trial. (pp 650 h & 651 a)

[5] The defendant's application for particulars arising under para 5.1(iva) of the amended claim was rejected. The particulars did not arise out of matter pleaded by the plaintiff but rather, out of the defendant's own averment as evidenced in para 6(f) of the re amended defence. (p 652 a-b)

[6] The defendant was not entitled to the particulars sought for under para 5.1(v) of the amended claim. It was a matter of evidence as to how the letter got into the hands of the newspapers concerned. It was not for the plaintiff to furnish the particulars thereof. (pp 652 f-g & 654 b)

[7] Similarly, the defendant's application for particulars on matters arising under para 5.1 (vi) was rejected. The date, time and place of circulation of the said letter were matters of evidence and therefore, no particulars were needed to be given by the plaintiff. The defendant, furthermore, did not deny that he had written the said letter; the only dispute was as to how the letter got published on the electronic media. This was also a matter of evidence. (pp 654 f-g & 655 c)

[8] As far as the pleading relates to the defendant's agents or servants, the plaintiff ought to properly give particulars of the agents and servants and the reporters of the respective newspapers. It would be a difficult task for the defendant to prepare his defence without knowing who his servants or agents are and the reporters to whom they (the servants and agents) were alleged to have spoken to. Hence, the plaintiff was directed to give the particulars as prayed for by the defendant in para 4(a), (b) and (c) of encl. 24. (pp 655 g & 656 e)

[9] The defendant's application in para 5 of encl. 24 was rejected as the particulars sought for here were irrelevant for the purpose of para 9(b). The facts pleaded in the said paragraph were only to support the plaintiff's claim for exemplary damages. (p 656 h)

[10] With regards to the particulars prayed for by the defendant in para 6 of encl. 24, since the plaintiff had raised the matter in his pleading, therefore it was fair for the plaintiff to provide the particulars asked for, to enable the defendant to prepare his case. The particulars may be evidential in nature but nevertheless, it is important for the defendant in order to answer the plaintiff's claim for exemplary damages. (p 657 e-f)

[11] The plaintiff was ordered to furnish the particulars as prayed in para 7 of encl. 24. This was because the particulars sought by the defendant were highly relevant to the issue of the credibility of the client. If the client had fled the country to avoid investigations and charges, then the defendant ought to exercise more care in acting on the instruction of the client. This was relevant to the issue of whether the defendant had in the circumstances acted recklessly or without caring, a fact which was asserted by the plaintiff. Therefore, it was necessary for the plaintiff to provide the particulars thereof. (p 658 b-c)

[Ordered accordingly.]

Case(s) referred to:

Bohjaraj Kasinathan v. Nagarajan Verappan & Anor [2001] 4 CLJ 433 ***(refd)***
Bradbury v. Cooper [1883] 12 QBD 94 ***(foll)***
Dato' V Kanalingam v. Tommy Thomas [1998] 3 CLJ Supp 429 ***(foll)***
Lazarus v. Deutsche Lufthansa AG [1985] 1 NSWLR 188 ***(dist)***
Russel & Anor v. Stubbs Ltd [1913] 2 KB 200 ***(refd)***
Skrine & Co v. MBf Capital & Anor [1998] 3 CLJ 432 ***(foll)***
Tan Hoe Hock v. Ali Akarbara Mangudin & Ors [1997] 4 MLJ 311 ***(foll)***
Theaker v. Richardson [1962] 1 All ER 229 ***(refd)***
Thiruchelvasegaram v. Mahadevi [2000] 5 CLJ 435 ***(refd)***
Zainudin Muhamad v. NEC System Integration Construction Ltd [2000] 6 MLJ 763 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 126(1)
Rules of the High Court 1980, O. 18 r. 12(3)

Other source(s) referred to:
Gatley, *Libel and Slander*, 9th edn, p 649
Supreme Court Practice, 1997, vol 1, p 308
Suzanne B McNicol, *Law of Privilege*, 1992 edn, p 97

For the plaintiff - RR Sethu; M/s RR Sethu
For the defendant - Porres P Royan (Michael Lum); M/s Shook Lin & Bok

Reported by Raja Vishnu Sivarajah

JUDGMENT

Arifin Zakaria J:
The plaintiff at all material times is the Minister of Transport in the Government of Malaysia. He is the elected member of Parliament for Labis Parliamentary constituency. He is also the President of the Malaysian Chinese Association ("MCA"); a political party, which is a component of the Barisan Nasional, the ruling party in this country since independence. The defendant is at all material times an advocate and solicitor practising under the name of Krish Maniam & Co.

The defendant claims that at all material times he was acting for and representing one Dato' Soh Chee Wen ("the client").

The claim herein arose out of the letter dated 13 June 2000 ("the said letter") written by the defendant addressed to the plaintiff. The contents of the letter were published in various newspapers in the country on 14 June 2000. It is not in dispute that the day in question was a public holiday and one day prior to the delegates conference of the MCA.

Application For Particulars
Arising from the respective pleadings the parties herein applied for further and better particulars pursuant to O. 18 r. 12(3) of the Rules of the High Court. 1980 ("the RHC"). The pleadings currently before the court are:

(a) the amended statement of claim;

(b) the re amended defence; and

(c) the plaintiff's reply;

The Principles Governing Particulars

At the out set it is necessary to state the functions of particulars. This is comprehensively set out in the *Supreme Court Practice*, 1997, vol. 1, p. 308 which reads:

> The function of particulars is accordingly:
>
> (1) to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved (per Lindley LJ in *Duke v. Wisden* [1897] 77 LT 67, p. 68 per Buckley LL in *Young & Co. v. Scottish Union & Co.* [1907] 24 TLR 73 pf. 74, *Aga Khan v. Times Publishing Co.* [1924] 1 KB 675, p. 679);
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> (2) to prevent the other side from being taken by surprise at the trial (per Cotton LJ in *Spedding v. Fitzpatrick* [1888] 38 Ch. D 410, p. 413. *Thomson v. Birkley* [1882] 31 WR 230;
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> (3) to enable the other side to know with what evidence they ought to be prepared and to prepare for trial (per Cotton LJ ibid; per Jessel MR in *Thorp v. Holdsworth* [1876] 3 Ch. D 637, p. 639; *Elkington v. London Association for the Protection of Trade* [1911] 27 TLR 329 p. 330);
>
> (4) to limit the generality of the pleadings (per Thesiger LJ *Saunders v. Jones* [1877] 7 Ch. D 435) or of the claim or the evidence (*Milbank v. Milbank* [1900] 1 Ch. 3 76, p. 385);
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> (5) to limit and define the issues to be tried, and as to which discovery is required (*Yorkshire Provident Life Assurance Co. v. Gilbert* [1895] 2 QB 148; per Vaughan Williams LJ in *Milbank v. Milbank* [1900] 1 Ch. 376; 385);
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> (6) to tie the hands of the party so that he cannot without leave go into any matters not included (per Brett LJ in *Philipps v. Philipps* [1878] 4 QBD 127, p. 113; *Woolley v. Broad* [1892] 2 QB 317) seen. "All material facts" para 18/7/10: and *Wooley v. Broad* [1892] 2 QB 317). But if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings (*Dean of Chester v. Smelting Corp.* [1902] WN 5; *Hewson v. Cleeve* [1904] 2 Ir. R 536).

It may be necessary to state in general terms the principles governing particulars. Firstly particulars may only be sought of matters arising from the pleading. Secondly it is a matter of discretion of the court whether to grant an order of particulars. (See *Dato' V. Kanalingam v. Tommy Thomas* [1998] 3 CLJ Supp 429, *Tan Hoe Hock v. Ali Akarbara bin Mangudin & Ors.* [1997] 4 MLJ 311). Finally it should be emphasised that particulars would not generally be ordered in respect of matters of evidence or inference drawn or substitute interrogatories. (See *Kanalingam v. Tommy Thomas (supra)*).

Guided by the above principles I shall now proceed to consider the applications before me.

The Plaintiff's Application (Enclosure 20)

The plaintiff applies for further and better particulars of the amended defence in regard to the following:

(a) Under para. 4.

The plaintiff seeks three particulars under this paragraph:

(i) the date when the client left the jurisdiction;

(ii) circumstances and reasons why the client had left the jurisdiction;

(iii) the present address of the client.

The plaintiff contends that these particulars are relevant to show how the defendant as solicitor, took instructions and verified (or able to verify) the instructions so taken. The plaintiff contends that these are relevant to the issue of the defendant's malice and recklessness. In his affidavit in reply encl. (22) the defendant stated that he has no knowledge of the matters sought by the plaintiff. It is further submitted that the particulars sought have no bearing or relevance to the facts or issues in this case. Finally it is submitted by the defendant that the particulars sought are matters of evidence to which particulars the plaintiff is not entitled.

Even accepting the position that the defendant owes a duty to verify the truth of the client's instruction as submitted by the plaintiff; however, I agree with the defendant's submission that the particulars sought for are matters of evidence for the defendant to adduce to show whether he had taken reasonable step to verify the instruction given by his client. I also fail to see how the circumstances and reasons for the client's absence from jurisdiction and the client's present whereabout has any relevant to the present action.

As was stated by the CA in *Skrine & Co v. MBf Capital & Anor* [1998] 3 CLJ 432:

> At the heart of the dispute between parties lies the well established principle that governs the law of particulars in the field of practice and procedure. It is this. **A litigant is entitled to have from his opponent, particulars of facts relevant to the issues at stake in order to prevent surprise, but he is not entitled to have his opponent's evidence.**
>
> The second Defendant contends that the aforesaid request under para 9 of the amended reply is fact based. The plaintiffs say that it relates to evidence. Whether it is of the one class or the other depends upon the application of the principle to the particular facts of each case ... . (emphasis added)

For the above reasons I rejected the plaintiff's application for particulars under para. 4.

(b) Under Paragraph 6(a) And 6(b)

The particulars sought under paras. 6(a) and (b) of the re amended defence relate to:

(i) the date and mode of the instructions; and

(ii) the location of the client at the time of the alleged conversation/ instructions.

The plaintiff contends that the date and mode of the instructions are important to the verification of the truth of the contents of the letter of demand *vis a vis* the plaintiff. It is further contended that the date of instruction, lapse of time and distance (of the client's location) are relevant to the question of verification. The defendant's answer to this is that the particulars sought under these paragraphs are covered by legal professional privilege as they relate to communication made between the defendant and client in the course and for the purpose of the defendant's employment. The defendant relies specifically on s. 126(1) of the Evidence Act 1950 which reads as follows:

> s. 126(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

The defendant submits the words "any communication" in s. 126(1) of the Act includes time, date, mode, manner etc. of such communication. No authority was submitted by the defendant to support this contention. Having considered this issue I agree with the submission of counsel for the plaintiff that particulars sought in para. 6(a), and 6(b) do not come within the ambit of legal and professional privilege as provided in s. 126 of the Evidence Act. As stated by Suzanne B. McNicol in the book *Law of Privilege* (1992 edn.) at p. 97:

Legal professional privilege only applies to communications. It will not, therefore, prevent the disclosure of facts observed or discovered by either party in the course of their relationship as client and legal adviser. As Parke B. stated in *Dwyer v. Collins*, "the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them". The "observed facts" exception highlights the limits of the doctrine of legal professional prilivege, for, as Heerey J stated in *National Crime Authority v. S*, legal professional privilege "does not depend on some notion that the lawyer's knowledge becomes the property of his client". This means that any facts which a legal adviser would have ascertained in any event, irrespective of professional skill and irrespective of a confidential communication with the client, will not be privileged. For example, the client's name and address are facts which are often not communicated confidentially to the legal adviser. Similarly, facts such as the client's handwriting, the client's mental capacity, the existence of a retainer between the legal adviser and client and the fact that the client put in pleadings and swore an affidavit have all been held within the exeption to legal professional privilege. Furthermore, it appears that any information which is communicated other than by oral or written means is not protected by the privilege. As Martin B. said in *Brown v. Foster*, privilege does not attach to "matters which the counsel sees within his eyes". This necessarily entails that personalty, chattels or any other type of physical object, other than documents, cannot be protected by the privilege.

Further I find the particulars sought for under these two paragraphs are relevant to the issue of verification of the truth of the letter of demand with the client. I therefore ordered that the defendant do furnish to the plaintiff the particulars sought for under paras. 6(a) and (b) of the re amended defence as prayed for by the plaintiff.

(c) Under Paragraph 6(h) Of Re-Amended Defence

In para. 6(h) of the re-amended defence the defendant pleaded that "A copy of the said letter was transmitted by facsimile to the said client, as instructed by him, from the defendant's office";

The plaintiff now seeks the address and telephone number of the facsimile to which the letter was transmitted on 13 June 2000 and the date and mode of client's instruction to do so.

Relying on *Thiruchelvasegaram v. Mahadevi* [2000] 5 CLJ 435, the learned counsel for the plaintiff contended that to transmit a letter by facsimile where it can be read by a third person, is publication for the pupose of the law of defamation. (There though the CA reversed James Foong J decision on the facts of that case it did so on the ground that the communication was from one firm of solicitors to another in pending litigation and therefore it was privileged.) The case of *Zainudin bin Muhamad v. NEC System Integration*

Construction Ltd. [2000] 6 MLJ 763 would support the same point. In para. 7 of his affidavit in reply the defendant stated he is prepared to give the address of the client's office to which the said letter was sent and the facsimile number to which the said letter was transmitted. The defendant however claim privilege from furnishing the particulars of the date and mode of the client's instruction. The learned counsel for the defendant in his submission contended that the particulars in respect of the date and mode of the client's instruction in para. (b) of encl. (17) is covered by legal professional privilege under s. 126 of the Evidence Act 1950 as they relate to communication made between the defendant and the said client in the course and for the purpose of the defendant's employment as the said client's advocate. However, I agree with learned counsel for the plaintiff that legal professional privilege only extend to communication for the purpose of seeking legal advice. It is limited to the information for, and content of any legal advice and it does not extend to matters observed by solicitor in the course of his retainer. This is, I think, in line with the provisions of s. 126 of the Evidence Act. For the above reasons I am of the view that the privilege does not extend to the date and mode of the client's instructions. Accordingly I ordered that particulars be given in respect of matters as prayed in prayer 1(4) (a), (b), (c) of encl. (20).

(d) Under Paragraph 6(1) Of The Re-Amended Defence

In para. 6(1) the defendant pleaded that the defendant had been informed that one Lee Chai Huat had published the said letter to the various newspaper. The plaintiff in encl. (20) seeks, the following particulars:

(i) identify the source of the alleged information or the informant;

(ii) state the date of receipt of the alleged information;

(iii) state the position, status and relationship of the said Lee Chai Huat to the client.

The plaintiff's counsel contended that the particulars are relevant and essential as it would enable the plaintiff to prepare his case and also to tie down the defendant to a definite story.

For the defendant it is submitted that the particulars sought herein are irrelevant to the facts in issue and further or alternatively, the particulars sought are matters of evidence to which the plaintiff is not entitled to particulars of. The defendant submitted that what is relevant to para. 6(1) is whether or not Lee Chai Huat published the said letter to the various newspapers. On the pleading the defendant need only to prove the same and not who told the defendant that Lee Chai Huat published the said letter.

Going by the pleading I agree with the defendant that the particulars sought for are irrelevant to the issue herein and the question of how or from whom the defendant obtained the information is a matter of evidence for the defendant to adduce at the trial. For those reason I dismissed the plaintiff's application in prayer 1.(5)(a)(b)&(c) of encl. (20).

The Defendant's Application (Enclosure 24)

The defendant applies for further and better particulars of the amended claim in regard to the following:

(a) Under Paragraph 5.1(iva) Amended Claim

In the said paragraph the plaintiff pleaded that:

> One Oong Boon See, the press secretary of the plaintiff and Lee Leck Cheng, the senior private secretary of the plaintiff, who in the ordinary course of business read the said letter and the defendant well knew or ought reasonably to know the letter would and intending the said letter should be so opened and read.

The defendant is seeking the following particulars:

> State who allowed or permitted the said Oong Boon See and the said Lee Leck Cheng to read the said letter.

The defendant submitted that the letter was not addressed to the two named persons so the defendant is entitled to know who allowed them to read the said letter. The plaintiff contended that nowhere it is pleaded in paragraph 5.1(iva) that both Oong Boon Seng and Lee Leck Cheng were permitted to read and hence the particulars sought do not really arise out of a matter pleaded in the amended claim – if anything the plaintiff contended the defendant is in fact seeking particulars arising out of his own averment since in para. 6(f) of the re amended defence the defendant states that:

> The Defendant has no knowledge that the said Oong Boon See or the said Lee Leck Cheng or any other person read the said letter or that the said letter would be or ought to be read by the said person (except with leave or licence of the Plaintiff).

The plaintiff submitted that the plaintiff's averment not founded on leave, licence or permission. The plaintiff further submitted that based on the case of *Theaker v. Richardson* [1962] 1 All ER 229 it is sufficient basis for publication in the law of libel if third parties happen to read a letter in ordinary course of business.

I agree with the submission of the plaintiff that the particulars sought under para. 5.1(iva) do not arise out of matter pleaded by the plaintiff but rather out of the defendant's own averment. The plaintiff's case is that the said letter was read by Oong Boon See and Lee Leck Cheng in the ordinary course of business having regard to their position in the plaintiff's office. For the above reasons I rejected the defendant's application for particulars arising under para. 5.1(iva) of the amended claim.

(b) Under Paragraph 5.1(v) Of The Amended Claim

In para. 5.1(v) of the amended claim the plaintiff alleges that the defendant caused, authorised or otherwise assisted or facilitated the circulation and publication of the said letter to various newspapers. The defendant is seeking the following particulars under the said paragraph:

(i) the date, time and place of each circulation and publication thereof;

(ii) how and by what way the defendant is alleged to have caused, authorised or otherwise assisted or facilitated in the circulation and publication of the said letter; and

(iii) identities of the person or persons to whom the said letter is alleged to have been circulated to and published.

The plaintiff's case is that the said letter was published in the various newspapers on 14 June 2000 and 15 June 2000. The defendant in the re amended defence did not deny the said publication in the newspapers except that he did not know and/or had no reason to know that the said letter or news features in respect thereof would be published in the print or electronic media. From the pleading it is obvious when the publication had taken place and the defendant had admitted that he had written the said letter. I think it is a matter of evidence as to how the letter got into the hand of newspapers concerned and it is certainly not for the plaintiff to furnish particulars thereof The defendant seeks to rely on what was said by Hunt J in *Lazarus v. Deutsche Lufthansa AG* [1985] 1 NSWLR 188 at pp. 191 and 192 that:

> The plaintiff should also have given in his statement of claim particulars of the identity of the persons to whom the publication is alleged to have been made. The identity of those persons (either general or precise) is of vital importance to a defendant in almost every defamation action, whether the publication was oral or in writing. In both cases, the defence of qualified privilege will depend upon the defendant being able to establish that those persons to whom he is alleged to have published the matter of complained of had a legitimate interest in the matter so published.

However, those remarks may be applicable to that particular case because there the alleged defamatory words were made orally in an aircraft. Unlike in the present case where the plaintiff is relying on the written document and the press report. As a matter of fact the same learned judge in pp. 192 & 193 also stated:

> On the other hand, the newspaper defendant in a written defamation case could hardly require the plaintiff to identify the readers of its newspaper. In this category, I include radio and television station defendants and their listeners and viewers respectively. This is not, as it is sometimes suggested, because the identity of the readers, listeners or viewers is a matter already within the defendant's knowledge, it is because the defendant does not have to meet any case based upon the precise identity of its readers, nor does it need to know that precise identity for any purpose in relation to its own defence. The plaintiff in his case will be relying upon the width or the unrestricted nature of the publication, not upon the precise identity of the persons to whom it was made, and similarly the defendants will stand or fall in relation to his defences upon the width of the publication and not upon the precise identity of the persons to whom it was made. There are, however, cases where a plaintiff will be ordered to give particulars identifying the persons to whom the publication is alleged to have been made, even in a newspaper case. In *Fullam v. Newcastle Chronicle and Journal Ltd*, the plaintiff was ordered to give particulars of the persons to whom the matter complained of was published who also had knowledge of the extrinsic facts upon which he relied in order to give to the matter complained of the secondary or extended meaning for which he contended as a true innuendo. That case was, of course, a somewhat special one in the light of the extraordinary extrinsic facts identified by the plaintiff, but it is not an isolated example: see also *Grappelle v. Derek Bloch (Holding) Ltd* [1981] 1 WLR 822 at 826, 829-830; [1981] 2 All ER 272 at 275, 278.

And at p. 193 he said further:

> Such cases support the rule, as I have sought to express it, that, in both oral and written defamation cases, particular should be supplied of the identity of the persons to whom the publication is alleged to have been made when that identity is relevant to either the plaintiff's or the defendant's case. That identity will usually be relevant in oral defamation cases and in written defamation cases where it was not published in the mass media; but that identity will not usually be relevant in mass media cases.

With regard to details of publication in libel, Gatley on *Libel and Slander* (9th edn.) at p. 649 stated thus:

> The General principle demands only that the defendant be given due notice of the case he has to meet, and there is no fixed rule as to what amounts to a sufficient averment of publication. However, unless there are good grounds for variance, the statement of claim should allege, in respect of each publication

> relied on as a cause of action, that the words were published by the defendant on a specific occasion to a named person or persons other than the Plaintiff. Where the publication complained of is in a newspaper, book or other publication "to the world at large", the plaintiff is not expected to plead particular acts of publication, the court accepting that publication in such cases is to be inferred.

In the circumstances I hold that the defendant is not entitled to the particulars sought for under para. 5.1(v) of the amended claim.

(c) Under Paragraph 5.1(vi) Of The Amended Claim

In the said paragraph the plaintiff pleaded that:

> (iv) the Defendant caused, authorised or otherwise assisted and facilitated in the publication of the said letter (and the defamatory words therein) on the internet webside of Malaysiakini.com and and intending and causing the said letter (and the defamatory words therein) to be read (and indeed read) by the world at large;

The defendant now seeks particulars of:

(i) the date, time and place of each circulation and publication thereof:

(ii) how and by what way the defendant is alleged to have caused, authorised or otherwise assisted and facilitated the circulation and publication of the said letter; and

(iii) identities of the person or persons to which the said letter is alleged to have been circulated to and published.

As for the date, time and place of circulation I think these are matters of evidence and therefore no particulars need to be given by the plaintiff. As for particulars sought for in (b) and (c) above, again the defendant did not deny that he had written the said letter, the only dispute is as to how the letter got to be published on Malaysiakini.com. This is also a matter of evidence. The defendant ought to know whether he had played any part in the publication of the said letter on the electronic media. It is for him to answer the plaintiff's allegation. As was observed Sir Gorell Barnes, President, CA in *Russel And Another v. Stubbs, Limited* [1913] 2 KB 200 at p. 203:

> They (the defendants) must know perfectly well whether they have published this alleged libel, and to whom, if any one, they have published it, and the allegations in the latter part of paragraph 4 of the statement of claim can present no difficulty or embarrassment to the defendants in framing their defence. They may say that they did not publish the report to any one or that they did publish it and it is true, or that they only published it to persons on occasions which made it a privileged communication. I cannot see that the defendants will have any difficulty whatever in meeting the plaintiffs' case ...

In that case para. 4 of the statement of claim reads:

> The persons to whom the said libel was published are the following – One Staniforth and a company called Milestone & Staniforth, Ld., and some clerk or employee of the said company, whose names are unknown to the plaintiffs. The plaintiffs believe that the said libel was published to some other persons whom they cannot specify, but they will rely upon the publication thereof to every person to whom they may discover it was published.

The defendants sought particulars of the persons to whom the libel complained of is alleged to have been published, giving the names, addresses of such person or persons, and the date or dates of such publication or publications and how and in what manner published. The Court of Appeal in that case confirmed the decision of the Master in rejecting the said application by the defendants. Similarly here the defendant's application for particulars on matters arising under para. 5.1(vi) ought to be rejected for the same reasons.

(d) Under Paragraph 5.1(vii) Of The Amended Claim

The plaintiff in para. 5.1 (vii) pleaded as follows:

> (vii) the Defendant, his agents and/or servants had on 13 June 2000 spoken to the reporters of New Straits Times, Sin Chew Jit Poh, the Sun and Nanyang Siang Pau confirming and repeating the contents of the said letter (and the defamatory words therein).

The defendant seeks the following particulars:

(a) reporters of the said newspapers who had spoken to on 13 June 2000 by the defendant, his agent and/or servant;

(b) the identities of the defendant's servants and/or agent;

(c) the words used by the defendant, his agents and/or servants to the respective reporters.

I am of the opinion that in so far as the pleading relates to the defendant's agents or servants the plaintiff properly ought to give particulars of the agents or servants and the reporters of the respective newspapers. I have come to this conclusion on the premise that it would be a difficult task for the defendant to prepare his defence without knowing who his servants or agents were and the reporters to whom they were alleged to have spoken to. Particulars, however, need not be given in so far as it involved the plaintiff himself because he ought to have known to whom he had spoken to or if none at all then he could deny the same. I am supported in this by the view expressed by Grove J in *Bradbury v. Cooper* [1883] 12 QBD 94 at p. 95 when he said:

> In this case if the slanders complained of had been alleged to have been uttered by the defendant himself I should have had much doubt whether he could compel the plaintiff to give the particulars asked for. I am not satisfied that the modern practice has been to order particulars of the names of the persons to whom the slanders were uttered. Where the defendant is alleged to have uttered them himself he may be supposed to know to whom he did utter them. In old days it was no doubt the rule that where the plaintiff claimed special damage by reason of the slander having been uttered to particular persons, he must give the names of those persons. However I give no opinion upon the question which would arise if the defendant was accused of having uttered the words himself. But the present is a different and an unusual case. The words are said to have been uttered by Timson "at the request and by the direction of the defendant," and particulars are asked of the persons to whom Timson uttered them. The defendant cannot tell where or under what circumstances Timson uttered the words, and may therefore come to trial in entire ignorance of the persons to whom they were uttered, and unprepared to meet the case made against him. He might not be able to call Timson, and could not meet the plaintiff's claim for damages – whether general or special – without knowing to whom Timson was alleged to have uttered the slanders complained of. This case, therefore, is unlike any cited before us in argument. I am of opinion, that the defendant is entitled to the particulars he asks for, and that the order of the judge at chambers should be affirmed.

On the above I therefore direct that the plaintiff do give particulars prayed for in para. 4(a), (b) & (c) of encl. (24) in so far as it relates to the defendant's agents and/or servants.

(e) Under Paragraph 9(b) Of The Amended Claim

In para. 9(b) of the amended claim the plaintiff alleges that:

> (b) the said letter was sent and published in the press during a public holiday (Prophet Muhamad's birthday) ie, 15 June 2000 and two days before the Annual General Meeting of the Malaysian Chinese Association which meeting was already sufficiently advertised and well-known before the said letter was sent;

The defendant seeks the following particulars:

> State by and to whom was the said letters sent.

In this regard I agree with the plaintiff's submission that the particulars sought for here is irrelevant for the purpose of para. 9(b) as the facts pleaded in the said paragraph is only to support the plaintiff's claim for exemplary damages. For that reason I would reject the defendant's application in para. 5 of the encl. 24.

(f) Under Paragraph 9(g) Of Amended Claim

In para. 9(g) the plaintiff alleges that:

> (g) the allegations in the letter, on the face of the contents, were four years old and stale;

The defendant seeks the following particulars:

> (a) state who made the allegations four years ago;
>
> (b) state where and to whom were the allegations made.

The plaintiff contended that the pleading here relates to exemplary damages and like aggravated damages it need not be pleaded (see *Bohjaraj a/l Kasinathan v. Nagarajan a/l Verappan & Anor* [2001] 4 CLJ 433). The fact that it is pleaded, he contended, does not entitle party to particulars of it. The plaintiff in his affidavit affirmed on 12 October 2000 (encl. 27) stated in para. 13.1 that the period should be two years not four years and this had been clarified in para. 3.2(a) of his reply. In para. 13.3 he said further that his solicitors had already notified that these allegations had appeared on the internet sites namely freemalaysia.com. and malaysia.net/sangkancil and raised by opposition members of Parliament, such as Mr. Lim Guan Eng on 19 December 1996 and Mr. Lim Kit Siang on 14 July 1998 in the Dewan Rakyat. In this regard I am of the opinion that since the plaintiff had raised the matter in his pleading therefore it is just fair for the plaintiff to provide the particulars asked for to enable the defendant to prepare his case. The particulars in question may be evidential in nature but nonetheless I think it is important to the defendant in order to answer the plaintiff's claim for exemplary damages. I, therefore, ordered that particulars be given as prayed for in para. 6 of encl. (24).

(g) Under Paragraph 10(c) Of Amended Claim

In para. 10(c) the plaintiff claims that:

> (c) the defendant had acted recklessly and without caring for the truth of the defamatory allegations in the said letter or unverified instructions from the said Soh Chee Wan who has fled the country to avoid investigation and charges by the relevant authorities aforesaid.

The defendant seeks the following particulars:

> (a) state what is the said Soh Chee Wen being investigated for;
>
> (b) state what charges have been or are being prepared against the said Soh Chee Wen;

The plaintiff in his affidavit in reply states that the particulars sought for are irrelevant. He also contended that the defendant, more than anyone else ought to know the reason for absence of client.

In my opinion the particulars sought by the defendant is highly relevant to issue of the credibility of the client. If the client had in fact fled the country to avoid investigations and charges by the relevant authorities as alleged by the plaintiff, the defendant ought therefore to exercise more care in acting on the instruction of the client. To me this is relevant to the issue of whether the defendant had in the circumstances acted recklessly or without caring. I don't think it is open to the plaintiff to simply respond by saying that the defendant ought to know better. It was the plaintiff who made those assertions therefore it is necessary for the plaintiff to provide particulars thereof. I, therefore, ordered that the plaintiff do furnish the particulars as prayed in para. 7 of encl. (24).

Costs

Costs for encl. (20) to be paid by the defendant to the plaintiff, while costs for encl. (24) to be paid by the plaintiff to the defendant.